EDITOR'S NOTE

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Supreme Court, U.S.
FILED
JUN 21 1985
ALEXANDER L. STEVAS
CLERK

84-1993

IN THE SUPREME COURT OF THE UNITED STATES

1985 Term

Victor Lepucki, Plaintiff John Hyde, Petitioner,	)	
v.	)	On Writ of Certiorari to
Bernard L. Van Wormer, et al, Defendants-Appellees,	)	the U. S. Court of Appeals for the 7th Circuit
AND	)	
Kenneth Pazdur, et al, Plaintiffs, John Hyde, Petitioner,	)	
v.	)	
Blaw-Knox Foundry & Mill Machinery, Defendant-Appellee	)	

Appendix

Pro Se John A. Hyde
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BEST AVAILABLE COPY

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

VICTOR LEPUCKI,

Plaintiff

-vs-

CIVIL NO.
H83-445

BERNARD L. VAN WORMER,
DONALD REGAN, Secretary of
the Treasury and Employer of
Van Wormer, and Richard
SMULEVITZ and his Employer
INLAND STEEL COMPANY,

Defendants

DEFENDANTS' MOTION TO DISMISS AND
FOR COSTS AND ATTORNEYS FEES

Comes now the defendants, RICHARD SMU levitz and INLAND STEEL COMPANY, by counsel, and moves the Court as follows:

1. To dismiss the plaintiff's Complaint for the reason that this Court lacks jurisdiction over the subject matter of the plaintiff's complaint.

2. To dismiss the plaintiff's Complaint for the reason that the Complaint fails to state a claim upon which any relief

can be granted.

3. To dismiss the plaintiff's Complaint for the reason that the plaintiff has failed to join a party needed for a just adjudication under F.R.C.P. 19.

4. For an award of attorneys fees and costs in favor of these defendants, and against the plaintiff.

Glenn R. Patterson (Signature)
Glenn R. Patterson, Attorney
for Inland Steel Company

SINGLETON, LEVY, CRIST & JOHNSON
9013 Indianapolis Boulevard
Highland, Indiana 46322
(219) 972-2660

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

VICTOR LEPUCKI,
Plaintiff

v.

Civil NO.
H 83-445

BERNARD L. VAN WORMER,
et al,

Defendants

ORDER

This cause is before the Court on a Motion to Dismiss filed by defendant Smulevitz and Inland Steel Company on September 27, 1983 and on a Motion to Dismiss or in the Alternative for Sumaary Judgment filed by defendants Van Wormer and Regan on October 3, 1983. The cause originally came before the Court on July 15, 1983 when defendants Smulevitz and Inland Steel Company filed a petition for removal; the petition sought removal, under 28 U.S.C. S 1441 and S1442, of an action which plaintiff had filed in the Superior Court of Lake County, Indiana, plaintiff having responded to both Motions to Dismiss, the cause is before the court for a ruling.

Facts

The complaint which plaintiff filed in state court, and which was removed to this Court, is in three counts: Count I alleges a cause of action against defendants Van

Wormer and Regan for alleged libel/slander; Count II alleges a cause of action against defendants Inland Steel Company and Smulevitz for wrongful withholding ("conversion") of portions of plaintiff's wages for payment of federal income taxes. Count III is an action against defendants Smulevitz and Inland Steel Company for libel/slander.

Plaintiff is an employee of defendant Inland Steel Company and was an employee of that company in 1981. At the beginning of 1981 plaintiff filed with this defendant a Form W-4 Withholding Allowance Certificate asserting that he was exempt from wage withholding and had no tax liability. Defendant Inland Steel Company accepted the form and sent it to the Internal Revenue Service of the United States of America ("IRS"). The IRS, after investigating plaintiff's claimed exemption, ordered Inland Steel Company to resume withholding federal income taxes from plaintiff's wages. The IRS also im-

imposed a penalty of $500.00 plus interest against the plaintiff for providing false information on the W-4 Form submitted to the IRS via Inland Steel Company. On May 23, 1983 plaintiff was informed by Richard Smulevitz, then payroll supervisor of Inland Steel Company, that the penalty for providing false information to the IRS was being deducted from his wages at the directive of the IRS.

It is these facts that provide the basis for the complaint. Plaintiff assert that the IRS' communication to Inland Steel Company that plaintiff was being penalized for providing false information to the IRS was a libelous/slanderous accusation; plaintiff seeks damages for $1,050,000 for this alleged defamation. Van Wormer is named as a defendant because he signed the penalty levy, acting thereby in the scope of his e employment for the United States Treasury,

personified in this action by Donald Regan, Secretary of the Treasury.[1/] Plaintiff alleges that defendants Smulevitz and Inland Steel Company acted wrongfully in withholding wages to satisfy the IRS' requirements; plaintiff demands return of the wrongfully withheld wages. Count III is a claim against Smulevitz and Inland Steel Company for damages of $1,050,000; the basis of the claim is that Smulevitz' comment with regard to the reasons for withholding the penalty from plaintiff's wages was slanderous.

Van Wormer and Regan: Motion to Dismiss or in the Alternative for Summary Judgment

Van Wormer and Regan move to dismiss the action against them under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject-matter jurisdiction.

1/ Included in the Motion to Dismiss or

in the Alternative for Summary Judgment submitted by the federal defendants are two affidavits, from Revenue Officer Van Wormer and from his supervisor, Thomas P. Bixler; these affidavits indicate that Van Wormer's actions in regard to plaintiff were at all times "procedurally and administratively in accordance with the appropriate sections of Internal Revenue Manual 5300, et seq."

Plaintiff admits in his complaint that the actions he characterizes as defamation were taken by defendant Van Wormer in the scope of his employment as an agent of the United States of America; Regan is also sued in his capacity as an official of the United States of America.

Government officials sued for defation based upon actions taken in the official scope of their duties are protected from liability by an absolute immunity created by federal common law.

Doe v. McMillan, 412 U.S. 306 (1973); Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Inst., 566 F.2d 289 (D.C. Cir. 1977), cert. denied 438 U.S. 915; Bush v. Lucas, 647 F.2d 573 (10th Cir., 1981), cert granted 102 S.Ct. 3481, affirmed 103 S.Ct. 2404; Scherer v. Manow, 401 F.2d 204 (7th Cir., 1968), cert. denied 393 U.S. 1084. So long as the act complained of is encompassed within "matters committed by law to his control or supervisicn'", the official is immune from civil defamation suits. Baer v. Matteo, 360 U.S., 564, 573-574 (1959), quoting Spalding v. Vilas, 161 U.S. 483 (1895). Plaintiff admits the communication at issue was made within the scope of Van Wormer's official duties as a revenue officer; therefore, Van Wormer and, derivatively, Regan are absolutely immune from suit.

The Court will, therefore, dismiss

plaintiff's action against Van Wormer and Regan. The dismissal will be entered pursuant to rule 12(b) (6) of the Federal Rules of Civil Procedure, dismissal for failure to state a claim upon which relief may be granted, despite defendants' motion for dismissal under Rule 12(b) (1) for lack of subject-matter jurisdiction.

Absolute immunity is a complete defense to an action for defamation; once established, it defeats liability entirely. W. Prosser, Handbook of the Law of Torts S114 (1971). When a complaint alleges facts that constitute an absolute defense to the claim asserted, that complaint "is vulnerable to a motion to dismiss for failure to state a claim upon which relief can be granted." 5 C.Wright & A.Miller, Federal Practice and Procedure S1226 (1969). The dismissal of a complain alleging defa-

mation based upon the defense of privileged communication is a dismissal for failure to state a claim under Rule 12(b) (6). Wallingford v. Zenith Radio Corp., 310 F.2d 693 (7th Cir., 1962); see generally Wright & Miller, Supra, at S3157. Therefore, it is under that rule that dismissal of this action will be entered.

Smulevitz and Inland Steel Company: Motion to Dismiss

Defendants Smulevitz and Inland Steel Company move to dismiss CountsII and III of the complaint. The Court finds the motion well-taken, and will enter an Order dismissing both claims.

Count II is for recovery for an allegedly wrongful withholding of wages. Count II fails to state a claim upon which relief may be granted; defendants were required to withhold the monies in question by a federal statute. 26 U.S.C. S3403 requires employers to withhold money due

for payment of taxes from employees' wages. And employers may not be sued for complying with the requirements of 27 U.S.C. S3404. As one court held in granting a Rule 12(b)(6) motion to dismiss a similar action, "the employer may be penalized by IRS for failure to pay the tax to it, [but] suits against it by employees for taxes withheld from the pay of such employees are statutorily barred." Chandler v. Perini Power Constructors, Inc., 520 F.Supp. 1152, 1156 (D.N.H., 1981); Ionsdale v. Smelser, 553 F.Supp. 259 (N.D.Tex., 1982). Therefore, Count II will be dismissed under Rule 12(b)(6) as failing to state a claim upon which relief may be granted.

Count III is an action for defamation based upon Smulevitz' statement to plaintiff that a penalty was being withheld from his wages, a penalty imposed for plaintiff's falsely representing to the IRS that he had no tax liability for the year in question.

A penalty was imposed upon plaintiff; that $500 penalty was imposed under 26 U.S.C. S6682. 26 U.S.C. S6682 provides for civil penalties for "[f]alse information with respect to withholding allowances." Therefore, plaintiff was penalized for false representations to the IRS, so that Smulevitz' statement was true.

Though not, perhaps, as categorical a defense as the defense of absolute immunity, truth is also a defense to an action for defamation, and is generally regarded as a complete defense to such an action. W. Prosser, Handbook of the Law of Torts S116 (1971); 18 Indiana Legal Encyclopedia, "Libel and Slander" S62; Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967), rehearing denied 389 U.S. 889; Olinger v. American Sav. & Loan Ass'n, 409 F.2d 142 (D.C.Cir., 1969); Moore v. Credit Information Corp. of America, 673 F.2d 208 (8th

Cir.,1982). Therefore, because Smulevitz' statement was true, defendants have a complete defense to the claim asserted in Count III; in the face of such a complete defense, the Plaintiff's allegation must be dismissed under Rule 12(b)(6) for failing to state a claim upon which relief can be granted. See discussion in preceding section.

Therefore, both Counts II and III will be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Costs

The collective defendants have moved for an award of the costs, including attorneys' fees, respectiveily incurred in this action.

Rule 54(d) of the Federal Rules of Civil Procedure permits the court to award costs "to the prevailing party" in an action. Such an award is a matter with-

in the trial court's sound discretion. Mareus v National Life Ins. Co., 422 F. 2d 626 (7th Cir.,1978); Clark v Universal Builders, Inc., 501 F.2d 324(7th Cir. 1974), cert denied 419 U.S. 1070; State of Illinois v Sangamo Const. Co., 657 F. 2d 855 (7th Cir., 1981). When an action has been dismissed for failure to state a claim, the defendant is the prevailing part. 6 J.Moore,W. Taggart & J. Wicker, Moore's Federal Practice Par. 54.70[4]; Wainwright Securities, Inc. v Wall Street Transcript Corp., 80 F.R.D. 103 (S.D.N.Y., 1978).

"The American rule concerning attorneys' fees is that fees generally are not awarded absent statutory authorization." Benner v Negley, 725 F. 2d 446, 449 (7th Cir., 1984). Defendants concede that there is no statute directing an award of costs and attorneys' fees in this action. But defendants rely upon an exception to the

so-called American rule: "The exception relevant to this case is that a district court may award fees when the losing litigant has 'acted in bad faith,vexatiously, wantonly, or for oppressive reasons.'" 725 F. 2d at 449, quoting Alyeska Pipeline Service Co. v Wilderness Society, 421 U.S. 240, 258-259 (1975). See also F.D. Rich Co. v Industrial Lumber Co., 417 U.S. 116, 129 (1974) and McCandless v Great Atlantic and Pac. Tea Co. Inc., 697 F. 2d 198,200 (7th Cir.,1983). When a litigant has acted in bad faith, it is within the "inherent authority" of the court to award costs and attorneys' fees incurred as a consequence of that bad faith. 421 U.S. at 259; 725 F.2d @ 449.

Such an award is appropriate only "if the litigant who filed the claim... acted in subjective bad faith, and...the claim...was unsupported by probable cause." Badillo v Central Steel and Wire Co. 717

F. 2d 1160, 1165 (7th Cir., 1983). Bad faith has been defined as conduct "'without at least a colorable basis in law.'" 725 F. 2d at 449, citing Analytica, Inc. v NPD Research, Inc., 708 F. 2d 1263, 1269 (7th Cir., 1983). Therefore, to warrant an award of attorney fees, there must be evidence that the Plaintiff filed an action with no colorable basis in the law; the Court finds that there is such evidence, and that an award of costs and fees is warranted.

Neither Plaintiff's defmation actions nor his action against Inland Steel Company for withholding of wages had a colorable basis in law. All the actions complained of were taken in accordance with statutes authorizing the collection of federal taxes, which Plaintiff characterizes as the "lust of the government for revenue." Plaintiff's responses to the

motions to dismiss are less legal briefs than ideological distribes asserting, among other things, that wages are not income and that dollars are not legal tender. The Seventh Circuit disposed of the former contention recently, with some asperity. United States v Kaliboski (No. 82 CR 892, decided April 24,1984, 7th Circ.) n.1. And the latter contention, like the others Plaintiff advances, is at once absurd and irrelevant to the legal issues raised.

An award of fees and costs is warranted herein because it is patently obvious that this action was instituted not for good faith reparation of an actual wrong but, rather, as a device for asserting certain philosophical beliefs regarding the tax laws of the United States and their implementation. Though Plaintiff has every right to the free expression of his beliefs in this area, he does not have the right to

exploit the judicial system of the United States, and resources of individual and corporate defendants thereof, to that end.

It is, therefore, ORDERED that Plaintiff's action against all named defendants herein be and the same is hereby DISMISSED under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

It is further ORDERED that defendants" motions for costs and attorneys' fees be and the same are hereby GRANTED. Defendants are to submit bills of costs and affadavits as to attorneys' fees within ten days from the date of receipt of this Order.

ENTER: May 31, 1984

James T. Moody
JUDGE, UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF INDIANA
Hammond Division

Victor Iepucki
Plaintiff

v Civil Action No.H83-445

Bernard L. Van Wormer

et al Defendants

JUDGMENT ORDER

Pursuant to this Court's order of May 31, 1984 and the verified petition for costs and attorney's fees filed by the federal defendants, Bernard I. Van Wormer and Donald Regan, it is ORDERED, ADJUDGED AND DECREED, That the federal defendants are hereby awarded $381.69 as reasonable costs and attorney's fees incurred in the above captioned case against the Plaintiff Victor Iepucki, and his attorney, John A.Hyde, jointly and severally.

Dated:

Hammond, Indiana _____ United States District Judge

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT for the

NORTHERN DISTRICT OF INDIANA-HAMMOND

VICTOR LEPUCKI

V Docket #H 83-445

Bernard L. Van Wormer
et al

James T. Moody, Judge

X Decision by Court. This action came before the court with the judge named above presiding. A decision has been rendered.

IT IS ORDERED AND ADJUDGED

that this action is dimissed against all named defendants under Rule 12(b)(6).

FILED
June 01 1984

Richard F. Timmons
Clerk
U.S. District Court
Northern District of Indiana

Richard F. Timmons

by: Susan I. Moore Date
6/1/ 84

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

KENNETH PAXDUF, et al
Plaintiffs

vs Cause No. H 83-0519

BLAW-KNOX FOUNDRY &
MILL MACHINERY
Defendant

DEFENDANT'S MOTION TO DISMISS
AND FOR COSTS AND ATTORNEYS FEES

Comes now the defendant, Blaw-Knox Foundry & Mill Machinery, a division of White Consolidated Industries, Inc., by counsel, and moves the Court as follows:

1. To dismiss the plaintiff's complaint fof the reason that this Court lacks jurisdiction over the subject matter of the plaintiff's Complaint.

2. To dismiss the plaintiff's Complaint for the reason that the Complaint fails to state a claim upon which any relief may be granted.

3. To dismiss the Plaintiff's Complaint for the reason that the plaintiff has failed to join a party needed for a just adjudication under F.R.C.P. 19.

4. For an award of attorneys fees and costs in favor of the defendant and against the plaintiffs.

Glenn R. Patterson
Glenn R. Patterson, attorney
for Blaw-Knox Foundry and
Mill Machinery

Singleton, Levy, Crist & Johnson
9013 Indianapolis Boulevard
Highland, Indiana 46322
(219) 972-2660

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

FILED Jul 23, 1984
at _____ M
Richard F. Timmons
clerk
U.S. District Court

Kenneth Pazdur, etal
Plaintffs

vs

Cause No. H83-519

Blaw-Knox Foundry and
Mill Machinery

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS

This matter is before the court on defendant's Motion to Dismiss and for Costs and Attorney Fees filed on September 21, 1983. Plaintiff's counsel requested and was granted an extension of time until October 27, 1983, to file a response to defendant's motion. Defendant's counsel did not file a response, and therefore, pursuant to Local Rule 7(b) this matter is ripe for summary ruling.

Plaintiff's complaint was originally filed in state court and removed to this court on August 25, 1983. Plaintiff's complaint is 80 pages and consists of nine counts. In particular Count I has seventy-two separate paragraphs. Plaintiffs are employees of defendant and are fairly characterized as "tax protestors."

Plaintiffs essentially challenge the constitutionality of defendant's actions of withholding part of Plaintiffs' wages pursuant to the federal income tax laws.

Defendant argues that Plaintiffs' complaint fails to state a claim upon which any relief can be granted. The Court agrees.

Title 26 U.S.C. Sec. 3402(a) states in relevant part:

> "Every employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with tables prescribed by the Secretary."

That the foregoing statute is constitutional and wages are income are well settled. United States v Koliboski, 732 F. 2d 1328 (7th Cir. 1984); Campbell v Amax Coal Co., 610 F. 2d 701,702 (10th Cir. 1979).

The basis of Plaintiffs' complaint is that the defendant complied with the federal statute cited above. In light

of the well settled law such a complaint is totally without merit. The filing of this complaint may, in fact, be in violation of Rule 11 of the FED.R.CIV.P.

The Seventh Circuit comments in a recent tax appeal case are appropriate. There the Court state:

> "The doors of this courthouse are of course open to good faith appeals of what are honestly thought to be erros of the lower courts. But we can no longer tolerate abuse of the judicial review process by irresponsible taxpayers who press stale and frivolous arguments, without hope of success on the merits, in order to delay or harass the collection of public revenues or for other nonworthy purposes."

Granzow v C.I.R., No.84-1036, Slip op. at 8 (7th Cir. July 13, 1984)

Defendant's request for costs and attorneys fees is taken under advisement.

Accordingly , IT IS THERFFORE ORDERED that Plaintiffs' complaint is DISMISSED with prejudice.

IT IS FURTHER ORDERED that defendand file a supporting memorandum and affidavit in support of their request for cots and fees on or before August 15, 1984.

ENTER: July 20,1984

Michael S. Kanne,Judge

Michael S. Kanne,Judge
United States District Court

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

KENNETH PAZDUR ET AL

V

Docket Number
H 83 - 519

BLA-KNOX FOUNDRY & MILL MACHINERY

Judge_____

_X_ Decision by Court. This action came to trial or hearing before the Court with the judge(magistrate)named above presiding.

The issues have been tried or heard and a decision has been rendered.

IT IS OPDERED AND ADJUDGED

Plaintfff's complaint is dismissed with prejudice.

FILED
Jul. 24, 1984
at_____ M
Richard E. Timmons,Clerk
U.S. District Court
Northern District of Indiana

Clerk:
Richard F. Timmons

by Deputy Clerk
Kathleen Graska

Date
July 24, 1984

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

KENNETH PATDUR, et al

CASE NO. H 83-519

DATE: October 25,1984

DFPUTY DAVID Porkoski

PFPORTFR Daniel J. Sullivan

JUDGF Michael S. Kanne

vs

Blaw-Knox Foundry &
Mill etal

FILED
Oct. 25 1984
at _____M
Richard F.Timmons,Clerk
U.S. District Court
Northern District of Indiana

OPEN 9:55 A. M.

CLOSF 10:35 A.M.

PLTF COUNSEL	DFFT. COUNSEL
none appearing	Joel Levy
	Glenn Patterson

PROCFEDINGS: HFARING ON MOTION FOR COSTS AND ATTORNFYS FFES

Plaintiffs Pazdur,Ware and Walker present without counsel. Defense counsel, as noted, present in court. Defendant argues motion for costs; Plaintiffs pro se, respond individually. Plaintiff Walker

moves the court for continuance so that Plaintiffs might retain counsel -DENIED. Defendants reply. The Court GRANTS the motion for costs and awards the defendants costs in the amount of $2,439.97. The costs are assessed against Attorney John Hyde in the amount of $2,139.97, and against all six (6) of the Plaintiffs individually in the amount of $50.00 each. Plaintiffs have 30 days to pay the costa awarded.

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-2314

JUDY EDGAR, *et al.*,

Plaintiffs-Appellants,

v.

INLAND STEEL COMPANY, a corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 82-C-658—Michael S. Kanne, *Judge.*

SUBMITTED AUGUST 15, 1984*—DECIDED SEPTEMBER 21, 1984

Before CUMMINGS, *Chief Judge*, CUDAHY, and FLAUM, *Circuit Judges.*

PER CURIAM. Taxpayers appeal the dismissal of their civil rights (42 U.S.C. § 1983) and breach of contract

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* After preliminary examination of the briefs, the Court notified the parties that it had tentatively concluded that argument would not be helpful to the Court in this case. The notice provided that any party might file a "Statement as to Need for Oral Argument." Appellants have filed such a statement and requested oral argument. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

claims against their employer, defendant Inland Steel Company, which failed to honor their claims of exemption from withholding of federal income taxes. We affirm.

Taxpayers filed withholding exemption certificates with defendant during the 1981 and 1982 tax years. Pursuant to regulations promulgated by the United States Treasury, defendant forwarded these certificates to the Internal Revenue Service (the "IRS"), which instructed defendant to resume withholding taxpayers' federal income taxes notwithstanding their claims of exemption. Treasury Regulation § 31.3402(4)(2)-1, T.D. 7682. When defendant complied with these instructions, taxpayers brought suit in state court, seeking an injunction barring further withholding of taxes, the return of taxes previously withheld, double wages, compensatory and punitive damages, and costs and legal fees.[1] Defendant removed the case to federal district court and, on November 2, 1982, moved for dismissal on the grounds that the court lacked jurisdiction to grant the requested relief, and that the complaint failed to state a claim upon which relief could be granted. The district court granted the motion without discussion on June 16, 1983. This appeal followed.

This lawsuit represents yet another disturbing example of a patently frivolous appeal filed by abusers of the tax system merely to delay and harass the collection of public revenues. Employees have no cause of action against employers to recover wages withheld and paid over to the government in satisfaction of federal income tax liability. 26 U.S.C. § 3403. *See Pascoe v. Internal Revenue Service*, 580 F. Supp. 649, 654 (E.D. Mich. 1984); *Lonsdale v. Smelser*, 553 F. Supp. 259 (N.D. Tex. 1982); *Chandler v. Perini Power Constructors, Inc.*, 520 F. Supp. 1152

[1] Plaintiffs' claim for injunctive relief is barred by 26 U.S.C. § 7421(a), commonly known as the Anti-Injunction Act, which, absent special circumstances not present here, prohibits any suit "for the purpose of restraining the assessment or collection of any tax ... by any person."

(D.N.H. 1981).[2] Even assuming that this statute does not bar plaintiffs' action, which it does, plaintiffs cannot recover under 42 U.S.C. § 1983. Section 1983 creates a remedy to redress deprivations, under color of state law, of any right, privilege or immunity secured by the Constitution of the United States. The statute, by its express terms, is directed only to state wrongdoing. At best, defendant acted under color of federal law when it complied with the IRS instructions; but section 1983 does not protect against such acts. *See Hubbert v. U.S. Parole Commission*, 585 F.2d 857 (7th Cir. 1978); *City of Milwaukee v. Saxbe*, 546 F.2d 693 (7th Cir. 1976); *Smith v. U.S. Civil Service Commission*, 520 F.2d 731 (7th Cir. 1975). *See also Zernial v. United States*, 714 F.2d 431 (5th Cir. 1983) (levying of wages by IRS accomplished pursuant to federal law by federal agents and private parties, and therefore taxpayer failed to state cause of action under 42 U.S.C. § 1983 because this section only provides redress for actions taken under color of state law).

Plaintiffs' claims that defendant breached their employment contracts by withholding taxes from their wages must also fail. The pleadings contain no allegation that the employment contracts contained clauses requiring defendant to refrain from withholding federal taxes from their wages. In the absence of such a provision, the employer discharges its contractual obligations when it pays its employees their wages, less withholding. *Stonecipher v. Bray*, 653 F.2d 398, 401 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982). *See also United States Fidelity & Guaranty Co. v. United States*, 201 F.2d 118, 120 (10th Cir. 1952).[3]

---

[2] Section 3403 provides:

> The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any such payment.

[3] We do not decide whether such a contractual term would be enforceable or void as against public policy.

Defendant requests costs and attorney's fees pursuant to Rule 38 of the Federal Rules of Appellate Procedure. We recently announced that "[a]busers of the tax system have no license to make irresponsible demands on the Courts of Appeals to consider fanciful arguments put forward in bad faith." *Granzow v. CIR*, 739 F.2d 265, 270 (7th Cir. 1984). *See also United States v. Ekblad*, 732 F.2d 562 (7th Cir. 1984). While it is unnecessary to reach plaintiffs' constitutional and statutory arguments, we note that their rambling, one hundred and sixty-one paragraph complaint contains virtually every imaginable time-worn challenge to the federal income-tax withholding system.[4] We therefore grant defendant's request for costs and reasonable attorney's fees. Defendant shall within 15 days of the filing of this order file with this court a submission as to the fees and costs they have incurred.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[4] Plaintiffs argue, *inter alia*, (1) that withholding is an illegal taking without due process of law, (2) that they are not "employees" subject to taxation, (3) that withholding constitutes a form of involuntary servitude under the 13th Amendment, (4) that defendant's refusal to honor their claims of exemption infringe on their "common law copyright," (5) that wages are not income and (6) that federal reserve notes are not money. Every court that has considered any of these claims has found them to be without merit.

USCA 40227—Midwest Law Printing Co., Inc., Chicago—9-21-84—400

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-2304

VICTOR LEPUCKI,

Plaintiff-Appellant,

v.

BERNARD L. VAN WORMER, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 83 C 445—**James T. Moody**, *Judge.*

No. 84-3041

KENNETH PAZDUR, et al.,

Plaintiffs-Appellants,

v.

BLAW-KNOX FOUNDRY AND MILL MACHINERY,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 83 C 519—**Michael S. Kanne**, *Judge.*

SUBMITTED MARCH 13, 1985—DECIDED APRIL 4, 1985*

Before BAUER, POSNER, and FLAUM, *Circuit Judges.*

PER CURIAM. Our system of jurisprudence is designed to insure that all disputants with colorable claims have access to the courthouse. Relatively low barriers to entry

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* This appeal was originally decided by unreported order on April 4, 1985. See Circuit Rule 35. The Court has subsequently decided to issue the decision as an opinion.

have, however, generated an undesirable result—a deluge of frivolous or vexatious claims filed by the uninformed, the misinformed, and the unscrupulous. These claims clog court dockets and threaten to undermine the ability of the judiciary to efficiently administer the press of cases properly before it. Perhaps the greatest safeguard against this danger is the integrity and good sense of practicing lawyers who, as officers of the court, have both an ethical and a legal duty to screen the claims of their clients for factual veracity and legal sufficiency. Model Rule of Professional Conduct 3.1 (1983); Fed. R. Civ. P. 11. Lawyers have a unique opportunity to counsel restraint or recklessness, to craft imaginative arguments or to press empty challenges to well-settled principles. Because of our reluctance to constrain the discretion of attorneys in the vigorous advocacy of their clients' interests, we penalize them only where they have failed to maintain a minimum standard of professional responsibility. But we will not overlook such a failure when it occurs, in part because it evidences disdain for the public, whose claims lie dormant because frivolous suits have diverted away scarce judicial resources, disdain for adversaries, who must expend time and money to defend against meritless attacks, and disdain for clients, whose trust is rewarded with legal bills, dismissals, and court-imposed sanctions. We have consolidated the following two appeals by attorney John A. Hyde as examples of irresponsible advocacy falling below minimum professional standards and deserving of penalty.

In *Pazdur v. Blaw-Knox Foundry and Mill Machinery* (No. 84-3041), appellant John A. Hyde represented various plaintiffs who sought, among other things, (1) an injunction barring their employer from "using or tendering various federal reserve notes as any purported payment for a debt obligation unless the creditor expressly consents to receive them," (2) an injunction barring the circulation of federal reserve notes, (3) a return of all of their wages withheld pursuant to the Internal Revenue Code and Treasury Regulations, and (4) costs and fees.

Defendant removed the cause, originally filed in Indiana state court, to federal district court. On September 21, 1983 defendant moved to dismiss, and requested costs and fees. Plaintiffs moved for an extension of time to respond, which the court granted through October 27, 1983. Plaintiffs failed to file a response and the court, on July 23, 1984, dismissed the complaint with prejudice and took defendant's motion for costs and fees under advisement. Defendant filed a memorandum in support of its request as well as an affidavit of costs and fees. On August 15, 1984, plaintiffs filed a memorandum in opposition. The court ordered a hearing for October 25, 1984 on the pending motion. While three of the party plaintiffs and counsel for defendant appeared, appellant John A. Hyde, counsel for plaintiffs, did not.[1] Defendant orally moved to award costs and fees against appellant pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927. The court assessed costs of $2,139.97 against appellant and costs of $50 each against the six party plaintiffs. John A. Hyde appeals from the $2,139.97 award alone.

His primary argument is that "as there are no dollars and a court can enter judgment only in dollars, no court can enter a valid judgment for money today." This outrageous contention is so absurd that it merits no response. In any event, we summarily rejected a nearly identical claim in a recent appeal in which appellant served as

[1] Appellant argues that plaintiffs authorized him to dismiss their case, and that once the district court dismissed it (although not pursuant to any request made by appellant), he did not feel compelled to attend the October 25, 1984 hearing since, in his mind, he no longer represented plaintiffs. But nothing in either Fed. R. Civ. P. 11 or 28 U.S.C. § 1927 limits a court's discretion to penalize only those lawyers who remain active on a case at the time the sanction is imposed. In any event, appellant filed a brief on behalf of plaintiffs in opposition to defendant's motion for costs and fees on August 15, 1984, long past the date on which he alleges his representation ended. Appellant either has intentionally misrepresented facts to this court, or has filed unauthorized pleadings on behalf of plaintiffs—themselves acts deserving of sanction.

plaintiffs' counsel. *Edgar v. Inland Steel Co.*, 744 F.2d 1276, 1278 n. 4 (7th Cir. 1984). Appellant also argues that he never received notice that penalties could be imposed against him and that he is entitled to a hearing before any penalty can be imposed.

We initially note that courts require notice and a hearing before they impose costs and fees against an attorney. *Cf. Hanley v. Condrey*, 467 F.2d 697 (2d Cir. 1972); *Miles v. Dickson*, 387 F.2d 716 (5th Cir. 1967). While the Notes of the Advisory Committee on Rule 11 point out that the procedure followed must comport with due process, it goes on to state that "[t]he particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge's participation in the proceedings provide him with full knowledge of the relevant facts and little further inquiry will be necessary." While appellant did not have explicit notice that the court would consider imposing costs and fees against *him* at the October 25, 1984 hearing, he knew that the court would consider generally the imposition of penalties. Such notice was sufficient under the circumstances of this case, and appellant, having voluntarily chosen not to attend the hearing, cannot now complain that he is entitled to additional process. The decision of the district court is affirmed.

The second appeal, *Lepucki v. Van Wormer* (No. 84-2304), involved an employee of Inland Steel Co. ("Inland"), who filed a Form W-4 Withholding Allowance Certificate claiming exemption from withholding. Inland sent the form to the Internal Revenue Service (the "IRS"), which, following an investigation, ordered Inland to resume withholding federal income taxes from plaintiff's wages. It also imposed a $500 penalty plus interest on plaintiff for providing false information on the W-4 form. Richard Smulevitz, then payroll supervisor of Inland, informed plaintiff that the penalty would be deducted from his wages pursuant to the directions of the IRS.

Plaintiff retained attorney John A. Hyde, who filed a complaint in Indiana state court asserting that IRS officials defamed plaintiff when they communicated to Inland that he was being penalized for providing false information on his W-4 form, that defendant Smulevitz repeated the slander when he relayed the information to plaintiff, and that defendants Smulevitz and Inland wrongfully withheld his wages to satisfy the IRS directive. Defendants removed the action to federal court. After the district court denied plaintiff's motion for remand, it dismissed the action against the named IRS officials, finding them absolutely immune from suit for defamation. The slander action against Smulevitz was dismissed after the court determined his statement to plaintiff to be true. The court also dismissed the claim for recovery of allegedly wrongfully withheld wages by Smulevitz and Inland, finding such an action barred by statute. 26 U.S.C. § 3403. *See Edgar*, 744 F.2d at 1278. Last, the court imposed costs and fees against plaintiff "because it is patently obvious that this action was instituted not for the good faith reparation of an actual wrong but, rather, as a device for asserting certain philosophical beliefs regarding the tax laws of the United States and their implementation. Though plaintiff has every right to the free expression of his beliefs in this area, he does not have the right to exploit the judicial system of the United States, and resources of individual and corporate defendants thereof, to that end." This appeal followed.

Plantiff first challenges the district court's denial of his motion for remand to state court. His complaint, among other things, seeks damages for libelous comments allegedly made by federal officials in the course of their employment. Such actions are removable to federal courts. 28 U.S.C. § 1442(a)(1). *See Stein-Sapir v. Birdsell*, 673 F.2d 165 (6th Cir. 1982); *Poss v. Lieberman*, 299 F.2d 358 (2nd Cir.), *cert. denied*, 370 U.S. 944 (1962). Moreover, where a defendant can properly remove one count in a complaint, he or she can remove the entire action, including pendent state law claims. *Cf. General Investment*

Co. v. Lake Shore Ry., 260 U.S. 261, 288-289 (1922); *National Audubon Society v. Dept. of Water and Power*, 496 F. Supp. 499 (E.D. Cal. 1980). Thus, the district court had jurisdiction to consider all of plaintiff's claims and did not abuse its discretion in refusing to remand the dispute back to state court. Neither did the district court abuse its discretion by awarding costs and fees to defendants for the filing of this patently frivolous suit. The rest of plaintiff's appeal consists of attorney John A. Hyde's familiar litany about the evils of federal reserve notes and other non-meritorious arguments. We affirm the district court's order.

We will no longer tolerate abuse of the judicial process by irresponsible counsel who obstinately continue to use the courts in bad faith as forums for expression of philosophic beliefs and not for the resolution of *bona fide* disputes. We have repeatedly cautioned against the filing of frivolous appeals such as these and have no hesitation imposing costs and reasonable attorney's fees, pursuant to Fed. R. App. P. 38, against attorney John A. Hyde as appellant in No. 84-3041 and as lawyer for appellant in No. 84-2304. *Granzow v. Commissioner*, 739 F.2d 265 (7th Cir. 1984); *Reid v. United States*, 715 F.2d 1148 (7th Cir. 1983) (sanctions imposed against attorney). We also impose costs against appellant Lepucki in No. 84-2304.

Last, we are referring attorney John A. Hyde to the appropriate state disciplinary bodies for investigation because of his pattern of abuse of the judicial process.

IT IS SO ORDERED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—5-16-85—450

JUDGMENT ORDER

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois

60604

April 4, 1985

Before

Hon. William J. Bauer, Circuit Judge

Hon. Richard A. Posner, Circuit Judge

Hon. Joel M. Flaum, Circuit Judge

No. 84-2304
VICTOR LEPUCKI
Plaintiff-Appellant

v

Barnard L. Van Wormer et al Defendants-Appelles

Appeal From the United States District Court for the Northern District of Indiana, Hammond Division No. 83 C 445
James T. Moody, Judge

No. 84-3041
KENNETH PAZDUR, ET AL
Plaintiffs-Appellants

v

BLAW-KNOX FOUNDRY AND MILL MACHINERY
Defendant-Appellee

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division, No. 83 C 519
Michael S. Kanne Judge

This cause came before the Court for

decision on the record from the United States District Court for the Northern District of Indiana, Hammond Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED in accordance with the order of this Court entered this date. Costs in No. 84-2304 are assessed against attorney John A. Hyde and appellant Victor Iepucki. Reasonable attorneys fees in No. 84-2304 are assessed against attorney John A. Hyde. Costs and reasonable attorney's fees in No. 84-3041 are assessed against appellant John A. Hyde.